

9 Official Opinions of the Compliance Board 290 (2015)

- ◆ **1(C)(1) ADMINISTRATIVE EXCLUSION, GENERALLY:
APPLICABILITY TO PERSONNEL MATTERS OFTEN UNCLEAR**
- ◆ **1(C)(2) ADMINISTRATIVE EXCLUSION: WITHIN EXCLUSION,
DISCUSSION OF DISMISSAL OF EMPLOYEE**
- ◆ **3(C) OPENNESS REQUIREMENT, PRACTICES IN VIOLATION:
EXCLUDING REPORTERS FROM MEETING OPEN TO THE
PUBLIC**

*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at
http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

October 19, 2015

Re: Mayor and Council of Pocomoke City
Deborah A. Jeon, Complainant, on behalf of the American Civil Liberties
Union of Maryland, Stephen Janis, and The Real News network,
(consolidated), *Complainants*

Deborah A. Jeon, Complainant, on behalf of the American Civil Liberties Union of Maryland, reporter Stephen Janis, and The Real News Network, has submitted two complaints in which she alleges that the Mayor and Council of Pocomoke City (“Council”) violated the Open Meetings Act. We have consolidated the complaints.

In the first complaint, Complainant alleges that the Council violated the Act by excluding members of the media from the Council’s meeting on July 13, 2015. In the second, she alleges that the Council violated the Act on June 26, 2015, and again on June 29, by meeting in a closed session, without notice to the public, to discuss terminating the town’s police chief. The city attorney responded on the Council’s behalf. Additionally, a Council member has written us to express support of the second complaint, as have officers and a member of the Legislative Black Caucus of Maryland, Inc.

To varying degrees, the submissions express opinions on whether the Council should have terminated the police chief’s employment. We have no authority to address the merits of personnel actions taken by public bodies. Our only authority in this matter is to give an advisory opinion on the

allegations that the Council violated provisions of the Act. *See* §§ 3-207 (issuance of opinions on complaints of violations), 3-209 (advisory nature of opinions).¹ We turn to that task now.

The July 13, 2015, meeting

Although the submissions show that there are some disagreements about the circumstances that gave rise to the complaint, the basic facts are undisputed. The Council met in its chambers on July 13, 2015, and a discussion about the termination of the police chief's employment was expected. The Council's chambers are small, and many more people wished to attend than the chambers could accommodate. Pocomoke City is in the southeastern part of the Eastern Shore, and members of the media, including Mr. Janis, had traveled a good distance to get there. Members of the public were admitted to the chambers, but members of the media were variously excluded from, or asked to leave, the chambers and were also instructed that they could not record from outside the chambers.

A Council member has since stated that he had wanted the press to leave to make room for town residents, and the minutes of the Council's August 4, 2015 meeting state that the mayor apologized to the press for his decision to exclude it from the meeting. According to the response, "clear instructions" have since been given "to all involved" not to exclude members of the media in the future, with the result that they were allowed to attend and record the Council's August meeting. Further, the response states, the Council's new city manager, who is an attorney and instructor of courses for local governments, has planned to train the Council and staff on open meetings compliance.

Subject to some exclusions and exceptions not relevant to the July 13 meeting, the Act requires public bodies to meet "in open session." *See* § 3-305. We find that the Council violated that provision; a meeting is "open" only if it is open to the public and the media on equal terms, and this meeting was not. *See 2 OMCB Opinions 67* (1999). The Council has already received and acted on its attorney's guidance on this point with regard to subsequent meetings.

Also relevant to circumstances such as these is the principle that public bodies should make reasonable efforts to meet in spaces that can accommodate the expected audience. The Council and other public bodies should review *3 OMCB Opinions 118* (2001) (Opinion No. 01-9) for guidance in determining what reasonable efforts they can take, consistent with the Act, to properly accommodate an expected audience. We do not comment on whether the Council violated the Act in this regard, because we

¹ Statutory references are to the 2014 volume of the General Provisions Article of the Maryland Annotated Code.

do not know whether it would have been feasible for the Council to move the July 13 meeting promptly to a larger space on such late notice. Finally, for guidance on regulating the recording of a meeting by members of the public and media, we refer the Council to 8 *OMCB Opinions* 128 (2013).

The June 26 and 29, 2015 meetings

While the submissions show there is some disagreement concerning some of the finer details of the meetings at issue here, the basic facts relevant to our review are undisputed. On June 26 and June 29, 2015, the Council met to discuss whether to terminate the police chief's employment. The mayor called the meetings on very short notice to the Council members because he believed that the matter was urgent. As a result, the Council met without giving any notice to the public. The complaint alleges that the Act applied to the meetings and that the Council violated it by failing to give notice and failing to vote in public to close them. Councilwoman Downing, who attended both meetings, confirms that the council met in closed session without voting on whether to exclude the public. She also states that she does not believe that the matter was urgent. The response states that the mayor convened the meetings without notice to the public on the belief that the meetings were exempt from the Act under the Act's express exclusion for the performance of administrative functions.

Unfortunately, the legal analysis applied to a public body's discussion of personnel matters is not readily understood and has resulted in confusion among public bodies and the public alike. The fundamental question is whether the discussion of personnel matters is an "exclusion" or an "exception" under the Act. The broad principles are as follows: The Act's open-meeting requirement is subject to some exclusions and some exceptions. *See* §§ 3-301 (setting the default that public bodies' meetings must be open "except as otherwise expressly provided"); 3-103 (expressly providing exclusions); 3-305 (expressly providing exceptions). Different consequences flow from each. Generally, if an exclusion applies to every function that a public body performs at a meeting, the Act does not apply at all, and we have no authority over the matter. §§ 3-103, 3-207. One such exclusion is the "administrative function" exclusion, formerly known as the "executive function" exclusion. *See* § 3-103(a)(1)(i). If the matter discussed falls within the definition of an administrative function, "it is excluded from the Act, no matter how important the matter might be considered or how keen the public interest in it." 8 *OMCB Opinions* 107,109 (2012), 6 *OMCB Opinions* 23, 26 (2008). A full explanation of the administrative exclusion can be found in 9 *OMCB Opinions* 110 (2014).

If the topic under discussion does not fall within an exclusion, the Act applies. That does not mean, however, that the public is entitled to hear every discussion that is subject to the Act. If the public body determines that any one of the Act's fourteen "exceptions" applies, then the public body is

entitled to discuss the matter in a closed meeting, provided certain steps are taken and the discussion stays within the scope of the exception. Before meeting in a closed session, the public body must first meet in a properly-noticed open session, where the presiding officer conducts a vote to close the session. In addition, a written statement must be prepared that discloses the particular exception to the Act being invoked, the topics to be discussed, and the reason for excluding the public from the discussion. § 3-305(d).² The “personnel exception” permits public bodies to meet behind closed doors to discuss the removal, discipline, resignation, or performance of their employees. § 3-305 (b)(1).³ The personnel exception does not shield discussions about personnel policies generally; the topic must instead pertain to the employment or appointment of a particular individual. *See, e.g.*, 7 *OMCB Opinions* 49, 55 (2010). There is also an exception, § 3-305(b)(13), for meetings that must be closed under a law that prevents public disclosure

² Section 3-305 (d) lists the conditions that the public body must meet before excluding the public:

- (1) Unless a majority of the members of a public body present and voting vote in favor of closing the session, the public body may not meet in closed session.
- (2) Before a public body meets in closed session, the presiding officer shall: (i) conduct a recorded vote on the closing of the session; and (ii) make a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed.
- (3) If a person objects to the closing of a session, the public body shall send a copy of the written statement to the Board.

³ As pertinent here, § 3-305(b) provides this conditional exception to the open-meeting requirement:

Subject to subsection (d) of this section, a public body may meet in closed session or adjourn an open session to a closed session only to:

(1) discuss:

(i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom it has jurisdiction; or

(ii) any other personnel matter that affects one or more specific individuals

about a particular matter. Often relevant to discussions about personnel matters is the provision of the Public Information Act that prevents public disclosure of “a personnel record of an individual.” § 4-311.

Here, the Council’s response states that the Act did not apply because the meetings concerned a “personnel/administrative” issue exempt from the Act. Alternatively, the response states, the Council could have closed the meeting under an exception because it involved personnel matters. If the Act, along with the personnel exception, applied, the response concedes, the Council indeed violated the Act by not conducting a public vote in a properly-noticed meeting, but the Council would have limited its written disclosures about the topic of the meetings so as to preserve the confidentiality of the police chief’s personnel information.

As explained at greater length in 9 *OMCB Opinions* 110, this Board has long remarked on the difficulty in applying the administrative function exclusion. In 2005, we issued a report on that subject. *Id.* at 113, citing Use of the Executive Function Exclusion under the Maryland Open Meetings Act - Study and Recommendations by the Open Meetings Compliance Board (December, 2005). We reported “confusion between meetings that fall outside the scope of [the Act] because they involve an [administrative] function,” and “meetings that may be closed under the Act in accordance with the Act’s procedural requirements [in] § 10-508.” *Id.* at 6, as quoted in 9 *OMCB Opinions* at 113. Sometimes, we explained, the discussion of a topic that falls within an exception falls *also* within the administrative exclusion. We gave the example of a town commissioners’ meeting for the sole purpose of evaluating a manager’s employment, and we stated that a public body could either “consider the manager’s employment evaluation as an executive function outside the Act” or conduct the evaluation “in a meeting closed under the Act [because] it involves a personnel matter.” Study, p. 6.

By the time we issued our report, we had often advised that meetings to take personnel actions were administrative in nature. 1 *OMCB Opinions* 166 (1996) (meeting to dismiss an employee), 3 *OMCB Opinions* 218, 221 (2002) (meeting to evaluate an employee’s performance), 1 *OMCB Opinions* 252 (1997) (meeting to fill a vacancy). Our opinion in 1 *OMCB Opinions* 191 (1996) (No. 96-12), cited by Complainant for the proposition that the Act applies to a public body’s meeting to dismiss an employee, is not inconsistent with our advice that such meetings may also be deemed administrative in nature. In 1 *OMCB Opinions* 191, we concluded that a municipal governing body violated the Act by meeting in a closed session, without following the steps required to invoke an exception, to dismiss the police chief. In a footnote, however, we noted that the closed-session rules “do not apply when a public body is engaged in an ‘executive function,’” but that the public body in question “did not assert that their closed session concerned an executive function.” *Id.* at 193, n. 1. In short, we did not decide

whether that meeting could have been deemed administrative, but we raised the possibility. *See also* 8 *OMCB Opinions* 120 (2012) (finding that the public body properly closed its open meeting under the personnel exception in order to discuss appointees, but that it also could probably have invoked the administrative exclusion); 6 *OMCB Opinions* 57, 61 (2008)(finding that meeting to select appointees was administrative).

Here, the facts presented to us are that the Council met to discuss whether to terminate the police chief's employment and to take action on that question. These facts are analogous to those in 1 *OMCB Opinions* 166, where we advised that a town council was performing an administrative function when it met to discuss the dismissal of an employee, and we therefore reach the same conclusion here.

Conclusion

In the first part of this opinion, we have found that the Council violated the Act by excluding members of the press from a meeting. That part of the opinion is subject to the announcement requirement set forth in § 3-211.

In the second part of this opinion, we have once again commented on the difficulties posed by the interpretation of the administrative function exclusion to the Act. Consistently with our prior advice on the application of the exclusion to discussions about individual employee matters, we have found that the meetings in question fell within the exclusion and thus were not subject to the Act.

Open Meetings Compliance Board

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